

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0570

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 152440). The employer filed a timely request for hearing. On June 13, 2019, ALJ Meerdink conducted a hearing, and on June 17, 2019, issued Order No. 19-UI-131769, concluding the employer discharged claimant for misconduct. On June 22, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant submitted a written argument. Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Salem Group Restaurant LLC employed claimant, last as a sous chef, from March 20, 2007 to April 22, 2019.

(2) The employer had a written policy that prohibited "workplace bullying" which was described therein, in part, as "engaging in repeated inappropriate behavior, including making negative comments about a person . . . [or] name calling." Transcript at 8; Exhibit 1. Claimant acknowledged the written policy by his signature and received multiple trainings on the policy. As a sous chef, which was a managerial position, claimant was expected to follow the policy and enforce it within the workplace. Claimant was aware of and understood the employer's prohibition against "workplace bullying."

(3) In October 2018, the employer's general manager received a report that an employee had recently resigned because claimant had bullied and belittled him by using profanity when talking to him, making him the object of inappropriate jokes, and by otherwise harassing him on a daily basis. On October 27, 2018, the general manager and the employer's executive chef spoke together with claimant about that report and claimant's conduct toward that coworker. Claimant did not dispute the report, and the general

manager and executive chef verbally warned claimant that any further violation of the employer's workplace bullying policy and mistreatment of coworkers would lead to further disciplinary action, including possible suspension or termination. Exhibit 1.

(4) On or about February 10, 2019, while criticizing a coworker, claimant called him a "whiner" in front of another line cook, which upset the coworker to the extent he complained to the general manager. The general manager learned at that time that claimant previously had used the "fuck" while criticizing that coworker about working slowly. Transcript at 11. The general manager warned claimant in writing that claimant's conduct constituted violations of the employer's policy against workplace bullying and that any future violation of that policy would lead to further disciplinary action up to and including termination. Exhibit 1.

(5) On April 18, 2019, while in the kitchen areas, claimant observed a subordinate cook's creation of a Crème Brûlée dessert. Claimant did not consider the coworker's dessert satisfactory, and complained to others, over the course of two hours, that it "looks like fucking shit," which upset the cook and caused him to use foul language in return. Exhibit 1. Claimant also told the cook to not get "butt hurt" over it or "mother fucking whine about it." Exhibit 1. After the general manager heard about the extent of those interactions, she suspended claimant and conducted an investigation.

(6) On April 22, 2019, the employer discharged claimant for violating its policy against "workplace bullying" on April 18, 2019.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent" means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c).

The employer had the right to expect claimant to refrain from engaging in inappropriate behavior toward coworkers and subordinates by using foul language or belittling them when criticizing the speed or end product of their work. Claimant acknowledged in writing that he was aware of the employer's policy and was counseled about violating it at least two times before April 18, 2019.

On April 22, 2019, the employer discharged claimant for violating that policy on April 18, 2019. On that day, claimant told a subordinate cook that his Crème Brûlée "looks like fucking shit" and not to get "butt hurt" over it. Transcript at 27-28, 35; Exhibit 1. Claimant explained that he only "was trying to correct him" in making those comments to his subordinate. Transcript at 27-28; Exhibit 1. However, the employer gave claimant a written warning for previously using the word, "fuck," when admonishing a coworker for working slowly. Claimant also admitted that he understood that it was not "okay to use the

language” that he did. Transcript at 28. Claimant’s admitted conduct and understanding of the inappropriateness of the language that he used demonstrated a conscious indifference to the potential consequences of his actions for the employer and constituted a wantonly negligent, if not willful, violation of its policy against workplace bullying.

Claimant’s April 18, 2019 conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Claimant’s April 18 conduct in bullying a coworker was a repeated act, and not an isolated instance. Claimant was verbally warned against engaging in such behavior on October 27, 2018 when he was confronted about belittling a coworker to the extent it caused him to resign. Claimant did not dispute that he had belittled the coworker in question by using foul language when talking to him, making him the object of inappropriate jokes, and otherwise harassing him. Given claimant’s admission that he understood that it was not “okay to use [foul] language” when speaking to a subordinate, more likely than not, claimant also understood in October of 2018 that engaging in belittling conduct that included the use of foul language toward a subordinate probably violated the employer’s policy against workplace bullying. Accordingly claimant’s October 2018 conduct was also at least wantonly negligent.

Nor can claimant’s April 18 conduct be excused as the result of a good faith error in his understanding of the employer’s expectations regarding appropriate conduct toward coworkers and subordinates. Claimant did not assert, and the record does not show, that he sincerely believed, or had a factual basis for believing, that the employer would condone belittling a subordinate’s work product by using foul language, especially given his prior warnings.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 19-UI-131769 is affirmed.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: July 29, 2019

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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